U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 27Feb2002

In the Matter of	:	
	:	
TAMER E. CALHOUN, SR.,	:	Case Number: 2000-BLA-1030
Claimant,	:	
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent,	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

Ron Carson, Lay Representative
For the Claimant

Douglas A. Smoot, Esquire
For the Respondent

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

Statement of the Case

This proceeding involves a request for modification of the denial of a claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §§ 901 et seq. ("the Act"), and the regulations promulgated thereunder.[1] Since this claim was filed after March 31, 1980, Part 718 applies. §718.2

[1] All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Claimant's Exhibits are denoted "C-"; Director's Exhibits, "D-"; Employer's Exhibits, "E-"; and citations to the hearing transcript are denoted "Tr."

Because the Claimant Miner was last employed in the coal industry in West Virginia, the law of the United States Court of Appeals for the Fourth Circuit controls (D-1, 2, 3). *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Procedural History

Claimant, Tamer E. Calhoun, filed his initial claim for benefits under the Act on March 22, 1994 (D-24-1). The District Director denied the claim on August 23, 1994 (D-24-16). Following Claimant's request for and the conduct of a formal hearing, Administrative Law Judge Gerald M. Tierney issued a decision and order denying benefits on December 31, 1996, because the evidence established neither the existence of pneumoconiosis nor any other respiratory or pulmonary condition related to coal mine employment[2] (D-24-17, -37, -38). Claimant appealed , and on December 23, 1997, the Benefits Review Board affirmed (D-24-39, -42).

The Claimant filed a subsequent claim for benefits on January 26, 1999 (D-1). The District Director denied benefits on April 26, 1999, because Claimant did not establish any element of entitlement, and, therefore, failed to show a material change in conditions (D-13). On April 17, 2000, Claimant submitted additional evidence and filed a request for modification (D-18). The District Director issued a Proposed Decision and Order Denying Request for Modification on June 6, 2000, and the claim was forwarded to the Office of Administrative Law Judges for a formal hearing at the Claimant's request (D-19, 21, 25).

A hearing was held in Abingdon, Virginia on January 9, 2001, at which all parties were afforded a full opportunity to present evidence and argument. At the hearing, Director's Exhibits one (1) through twenty-six (26), Employer's Exhibits one (1) through eleven (11), and Claimant's Exhibits one (1) and two (2) were admitted into the evidentiary record. (Tr. 7, 24-25). This tribunal's findings and conclusions which follow are based upon an analysis of the entire record, reviewed *de novo*, together with applicable statutes, regulations, and case law, in relation to those issues which remain in substantial dispute.

Issues

1. Whether the Claimant has proved the existence of a mistake in a determination of fact, or a change of conditions since December 31, 1996?
2. Whether the Claimant has established the existence of coal workers' pneumoconiosis?
3. Whether the Claimant's pneumoconiosis, if proved, was caused by his coal mine employment?
4. Whether the Claimant is totally disabled by a respiratory or pulmonary impairment?
5. Whether the Claimant's total disability, if proved, is due to pneumoconiosis

[2] Absent evidence of pneumoconiosis, the Claimant could not prevail, and, therefore, Judge Tierney did not make findings regarding the remaining elements of entitlement.

Findings of Fact, Conclusions of Law, and Discussion

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. For the purpose of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201. In order to obtain federal black lung benefits, a claimant must prove by a preponderance of the evidence that: "(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause to his total respiratory disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529, 21 BLR 2-323 (4th Cir. 1998); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 BLR 2-304 (4th Cir. 1995); 20 CFR §§718.201-.204 (1999); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

Background and Coal Mine Employment

Claimant was born on December 3, 1944, and graduated from high school after twelve years of formal education (D-1; Tr. 12). Claimant has two dependents for purposes of augmentation of benefits under the Act: his wife, Linda, whom he married on August 7, 1975, and remains married to, and his son Travis L. Calhoun, who was born on August 21, 1982, and is a full time student (D-1, 6,7, 25). In the previous claim, Judge Tierney found that the Claimant completed sixteen years and ten months of coal mine employment (D-24-38). The evidentiary record supports that finding, which the parties stipulated to at the January 2000 hearing (Tr. 8,13; D-4).

Employer, Consolidation Coal Company, was Claimant's only coal mine employer, for whom he worked in various positions. Claimant worked last as a roof bolter on March 2, 1994, when the mine shut down (D-2; Tr.14-15). As a roof bolter, Claimant remained standing for most of his shift and was required to continuously lift and carry fifty to one-hundred pounds (D-3). After leaving his last coal mine employment, Claimant worked as a foundry/steel worker for ten and one-half months (D-24-37 at 14, D-4).

Modification: Change in Conditions or Mistake in a Determinationof Fact

Claimant's request for modification is governed by§725.310, which provides that any party may request modification of an award or denial of benefits if such request is filed within one year of the denial alleging a change in conditions or mistake in a determination of fact. Where mistake of fact forms the grounds for the modification request, new evidence is not a prerequisite, and a mistake of fact may be corrected whether demonstrated by new evidence, cumulative evidence, or further reflection on evidence initially submitted. *Kovac v. BCNR Mining Corporation*, 16 BLR 1071 (1992), *modifying* 14 BLR 1-

156 (1990). If no specific mistake is alleged, but the ultimate determination of entitlement is challenged, the entire record must be examined for a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge, as trier-of-fact, has the authority, and the duty, to review the record evidence *de novo* and is bound to consider the entirety of the evidentiary record, and not merely the newly submitted evidence, in making a finding in regard to a mistake in a determination of fact in relation to a request for modification. *See Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *see also Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *see generally, O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

In determining whether a change in conditions has occurred, an Administrative Law Judge must "perform an independent assessment of the newly submitted evidence, in conjunction with evidence previously submitted, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision." *See Nataloni v. Director. OWCP*, 17 BLR 1-82, 1-84 (1993); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993).

This claim is a request for modification of a subsequent or duplicate claim. Under the pre-amended regulations, which apply to this case pursuant to §725.2(c), a subsequent claim shall be denied on the grounds of the prior denial unless the claimant demonstrates that there has been a material change in conditions. §725.309(d) (2000). To prove a material change of conditions, a claimant must prove, under all of the favorable and unfavorable probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc)*. In his denial of Claimant's initial claim, Judge Tierney found that Claimant failed to establish any element of entitlement. Therefore, even if it is found that Judge Tierney made a mistake in a determination of fact, the new evidence must be reviewed to determine whether the Claimant has established an element of entitlement since Judge Tierney's denial in order to succeed in his request for modification of the subsequent claim.

Evidence Submitted Since Judge Tierney's Denial of the Initial Claim

X-ray Evidence[3]

Exhibit No.	X-ray Date	Reading Date	Physician/ Qualifications	Interpretation
E-9[4]	6/7/94	6/7/94	Shahan R	0/0
E-9	6/24/94	6/24/94	Shahan R	0/0
D-11	3/12/99	4/12/99	Navani B/R	0/0
D-12	3/12/99	3/15/99	Forehand B	0/0
E-8	3/12/99	11/9/00	Wheeler B/R	0/0
E-8	3/12/99	11/8/00	Scott B/R	0/0
E-2	9/19/00	9/19/00	Hippensteel B	0/0
E-3	9/19/00	10/18/00	Wheeler B/R	0/0
E-3	9/19/00	10/18/00	Scott B/R	0/0
E-6	9/19/00	11/15/00	Kim B/R	0/0

[3] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "R". An interpretation of "0/0"signifies that the film was read completely negative for pneumoconiosis.

[4] Employer's Exhibit 9 is presumably the entire set of Dr. Forehand's treatment records for the Claimant. Accordingly, a portion of those records predate Judge Tierney's 1996 decision, and, therefore, under pre-amended §§ 725.414(e) and 725.456(d), these records should not have been admitted to the record absent a finding that either the admission of the evidence was requested by the Director or another party or that extraordinary circumstances caused the proponent's failure to submit the evidence at the appropriate time. §§ 718.414(e)(1), 725.456(d); *see Shertzer v. McNally Pittsburg Manufacturing Co.*, BRB No. 97-1121 BLA (June 26, 1998) (unpublished) (citing *Wilkes v. F.& R Coal Co.*, 12 B.L.R. 1-1 (1988)). However, since none of Dr. Forehand's records were previously submitted, and since the records were furnished by the Employer and there is no evidence of record suggesting that Claimant or Employer had such records in their possession during the pendency of the initial claim, this tribunal finds that Employer's Exhibit 9 was properly admitted to the record. However, those records pre-dating Judge Tierney's denial of the initial claim were not considered relevant to issues relating to whether Claimant's has established a change in conditions except to the extent that they shed light on Claimant's overall condition.

§§ 725.414(e) and 725.456(d) were eliminated from the amended regulations. The Department of Labor found that both sections were no longer necessary in light of amendments altering the adjudication of black lung benefits cases. 65 Fed. Reg. 79,991-2, 79,999 (December 20, 2000).

Pulmonary Function Studies [5]

Exh. No.	Date	Physician	Ht/ age	FEV_1	FVC	MVV	Valid	Qualify
E-9	7/5/94	Forehand	67"/49	1.77 2.21	2.87 3.45		Yes	No No
E-9	8/26/95	Forehand	67"/50	1.86 2.51	2.75 3.51		Yes	No No
E-9	4/1/98	Forehand	67"/53	1.40 2.10	2.35 3.23	38 47	Yes	Yes No
D-8	3/12/99	Iosif	67"/54	2.22 2.35	3.52 4.05		Yes[6]	No No
D-18	1/18/99	Coleman[7]	68"/54	1.68	2.56	35	No[8]	Yes

[5] The second set of listed values relates to post bronchodilator test results. Where there is a discrepancy among measurements of the Claimant's height, this tribunal is required to make a factual finding as to that height. *See Protoppas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This tribunal averages Claimant's reported heights to determine his height to be 67.56 inches.

[6] Dr. Iosif noted Claimant's good cooperation and fair understanding, but the administering technician, Louise Ball, interpreted the tracings and stated that Claimant's "[L]ow FEV 0.5 suggests poor initial effort." (D-8)

[7] The January 18, 1999 and March 30, 2000 pulmonary function studies were administered by Debi Coleman, a registered nurse and case manager at Stone Mountain Health Services. Dr. Bickley Craven, board-certified in family medicine, interpreted the results of the March 2000 study as indicative of a moderate obstruction and low vital capacity (C-1,2). The record does not indicate that Dr. Craven interpreted the January 1999 study; however Ms. Coleman pointed out that the study was indicative of a moderate obstruction and low vital capacity (D-18).

[8] Drs. Hippensteel and Castle, board-certified in internal medicine and the subspecialty of pulmonary diseases, found this study invalid due to variation in forced vital capacity measurements by more than 5%, which does not meet criteria for validity under American Thoracic Society or the Regulations (E-2, 5). Appendix B to Part 718. Dr. Jarboe invalidated the study due to suboptimal and inconsistent effort (D-5). Accordingly, because this study is invalid under the applicable regulation and three well-qualified physicians found it invalid, this study is considered invalid. *See Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986); *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984).

C-1	3/30/00	Craven	68"/54	1.76	2.91	62	No[9]	Yes
E-9	4/5/00	Forehand	68"/55	1.24	1.84		Yes	Yes
E-9	4/7/00	Forehand	68"/55	2.49	3.5		Yes	No
E-2	9/19/00	Hippensteel	68"/55	1.90 1.78	2.78 2.74	42	Yes[10]	Yes No

Arterial Blood Gas Studies

Exhibit	Date	Physician	pO_2	pCO_2	Qualifying
D-10	3/12/99	Iosif	84.7	37.6	No
E-9	4/5/00	Forehand	68	41	No
E-2	9/19/00	Hippensteel	70.4	45.4	No

Medical Opinion Evidence

The record contains thirty-three pages of miscellaneous medical records and progress notes related to Dr. Forehand's treatment of the Claimant for his asthma and allergies. (E-9). The records indicate that Dr. Forehand, board-certified in pediatrics and allergy/immunology, treated the Claimant for chronic active

[9] Dr. Hippensteel reviewed this study prior to his December 2000 deposition and found it invalid due to variation in effort as demonstrated by the variability in the peak expiratory flow. Dr. Hippensteel explained that the study met basic criteria for validity, but could have some underestimate of Claimant's function referable to his variation in peak effort. (E-10 at 25-27). Dr. Castle reviewed this study prior to his December 2000 deposition and found it invalid because Claimant only exhaled for about two and one-half seconds (E-11 at 24). Accordingly, because the two physicians who reviewed this study found it invalid based on Claimant's variable effort, this study is considered invalid. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984).

[10] Dr. Hippensteel noted that it took the Claimant six efforts pre-bronchodilator and eight attempts post-bronchodilator to get the correlation within 5% for FEV_1 and FVC. He also noted that the Claimant's severely decreased MVV with variable total volumes indicated suboptimal effort. (E-2). Because Dr. Hippensteel did not invalidate this study, this tribunal finds that this study is valid, though entitled to less weight in light Claimant's apparent suboptimal effort.

asthma and exacerbations thereof from 1994 through April 2000.[11] Progress records indicated Claimant regularly had suboptimal control of his respiratory allergies and asthma.

Dr. German Iosif, board-certified in internal medicine and the subspecialty of pulmonary diseases, examined the Claimant on March 12, 1999. (D-8,9,10). Dr. Iosif recorded occupational, medical, smoking, and family histories. Claimant's examination included pulmonary function and arterial blood gas testing and a chest x-ray. The chest x-ray was negative for coal workers' pneumoconiosis. Dr. Iosif opined that the pulmonary function testing indicated evidence of a moderate obstructive ventilatory defect which was not definitely improved after bronchodilator administration. He opined that the etiology of Claimant's obstructive respiratory impairment "could be under-reported cigarette smoking and/or true asthma with its typical bronchodilator responsiveness blunted by chronic and regular use of bronchodilator and anti-inflammatory inhaler therapy." Dr. Iosif opined that the existence of true asthma could render the Claimant unable to continue his former coal mine employment.

Dr. Iosif prepared a consultative report dated November 20, 2000, for which he reviewed additional medical evidence as summarized in pages one through eight of his report. (E-7). He stated that the medical records supported the existence of asthma, which is unrelated to coal or silica dust exposure. Dr. Iosif opined that Claimant's obstructive respiratory defect rendered him unable to return to his usual coal mining employment. He attributed Claimant's totally disabling impairment solely to the progression and poor control of his bronchial asthma. Dr. Iosif stated that his opinion would not change even if the Claimant was found to have coal worker's pneumoconiosis.

Dr. Kirk E. Hippensteel, board-certified in internal and critical care medicine and the subspecialty of pulmonary diseases, examined the Claimant on September 19, 2000 and reviewed additional medical evidence from Claimant's previous claim for his report of October 4, 2000. (E-2). Dr. Hippensteel noted that the Claimant was a Cherokee Indian and recorded occupational history, medical, smoking, and family histories. Dr. Hippensteel's examination included a negative chest x-ray, pulmonary function and arterial blood gas testing, and an electrocardiogram. Dr. Hippensteel opined that the pulmonary function testing suggested moderate obstruction with no significant change post-bronchodilator. Claimant's arterial blood gases were within the normal range. Dr. Hippensteel opined that the Claimant did not have coal workers' pneumoconiosis or any other coal dust related disease of the lung. He acknowledged Claimant's history of asthma, and noted that the Claimant was currently taking "multiple bronchodilator medicines," which he linked to Claimant's lack of a significant response to bronchodilators on tests for his examination. Dr. Hippensteel opined that, even if it were stipulated that he had coal workers' pneumoconiosis, Claimant had the pulmonary capacity to return to his regular job in the mines.

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[11] The professional credentials of Dr. Forehand are not in evidence. However, this tribunal takes judicial notice that his relevant qualifications are disclosed on the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990).

Dr. Hippensteel reviewed additional medical evidence and was deposed on December 18, 2000 (10 at 9-10). Dr. Hippensteel explained the proper use of Caucasian predicteds in evaluating Claimant's pulmonary function studies (E-10 at 11-13). Dr. Hippensteel explained that Claimant was not totally and permanently disabled by his obstructive respiratory impairment because his decreased lung function was not permanent. In forming his opinion, Dr. Hippensteel did not assume that the Claimant was undergoing optimal therapy for his asthma, but opined that with optimal management, his lung function would be improved on a more regular basis. (E-10 at 33-35). Dr. Hippensteel opined that Claimant's respiratory impairment was primarily, if not exclusively, caused by asthma unrelated to his former coal mine employment.

Dr. Loudon, who has the British equivalent of board-certification in internal medicine and the subspecialty of pulmonary diseases, prepared a consultative report dated November 4, 2000. (E-4). Dr. Loudon reviewed medical evidence as summarized in pages one through six of his report. Dr. Loudon opined that there was insufficient objective evidence to justify a diagnosis of simple coal workers' pneumoconiosis. He opined, based on the obstructive nature of Claimant's impairment, clinical, radiological, and physiological evidence, that the Claimant had a mild to moderate pulmonary or respiratory impairment resulting from asthma. Dr. Loudon stated that from a respiratory or pulmonary standpoint, the Claimant was not totally and permanently disabled from his regular coal mining work or work requiring similar effort. Dr. Loudon attributed Claimant's symptoms and impairment to his asthma and other forms of chronic obstructive pulmonary disease unrelated to his occupation. Dr. Loudon stated that, because of the obstructive and reversible nature of Claimant's impairment, his opinions would not change if Claimant were found to have coal workers' pneumoconiosis.

Dr. Thomas M. Jarboe, board-certified in internal medicine and the subspecialty of pulmonary diseases, prepared a consultative report dated November 14, 2000. (E-5). Dr. Jarboe reviewed medical evidence as summarized on pages one through three of his report. Dr. Jarboe opined that there was insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. Dr. Jarboe opined that the Claimant was not totally and permanently disabled from a respiratory standpoint to the extent that he would be unable to do his regular coal mining work or work requiring similar effort. He based this finding on the valid pulmonary function studies done under the direction of Dr. Castle. Dr. Jarboe acknowledged that the Claimant had bronchial asthma, but opined that with optimal medical therapy, his function should be normal or near normal. He found no disabling condition of the respiratory system which was caused by or contributed to by the inhalation of coal dust or the presence of coal workers' pneumoconiosis. Dr. Jarboe stated that his opinion would not change even if the Claimant were found to have coal workers' pneumoconiosis.

Dr. James R. Castle, board-certified in internal medicine and the subspecialty of pulmonary diseases, prepared a consultative report dated November 20, 2000, based on review of evidence summarized in pages one through five of his report. (E-5). Dr. Castle opined that the Claimant did not suffer from coal workers' pneumoconiosis because he did not demonstrate any physical findings indicating the presence of an interstitial pulmonary process, did not have radiographic evidence of coal workers'

pneumoconiosis, had essentially normal arterial blood gas studies, and that the pulmonary function studies performed since the previous claim showed evidence of a mild to moderate airway obstruction. Dr. Castle opined that Claimant's obstructive impairment was related to his long history of bronchial asthma, a disease of the public at large and unrelated to coal dust exposure. Dr. Castle opined that the Claimant was not totally or permanently disabled as a result of coal workers' pneumoconiosis or any other process arising from his coal mining employment, but that he was "very likely" disabled as a result of bronchial asthma. Dr. Castle concluded that even if the Claimant were found to have radiographic evidence of simple coal workers' pneumoconiosis, his opinion regarding lack of disability related to that process would remain unchanged.

Dr. Castle reviewed additional medical data, and was deposed on December 18, 2000. (E-11). Overall, Dr. Castle characterized the Claimant's respiratory impairment due to asthma as a generally mild to moderate impairment with periods during the exacerbations of severe obstruction. He stated that this pattern of impairment is very typical of asthmatics. (E-11 at 26-27). Dr. Castle opined that even with adequate treatment of his asthma, it would be difficult for the Claimant to return to his previous coal mine employment (E-11 at 27-28). He opined that Claimant's asthma would continue to deteriorate as he ages, and that Claimant will develop a more fixed degree of airway obstruction because of airway remodeling resulting from persistent inflammation in the airways. (E-11 at 28-29). Dr. Castle explained that Claimant's impairment was unrelated to that smoking history (E-11 at 31).

Evidence Submitted with the Previous Claim–Reviewed Here for a Mistake in a Determination of Fact and Utilized Thereafter as a Basis for Comparison to Determine a Change in Conditions

Having reviewed the evidence contained in the evidentiary record before Judge Tierney in conjunction with his Decision and Order of December 31, 1996, this tribunal finds that Judge Tierney's decision provides a reliable inventory of the evidence submitted with the previous claim with the exception of the consultative opinions of Drs. Jarboe and Loudon, which he did not explicitly refer to.[12] Based on review of that evidence, this tribunal found no mistake in a determination of fact.

[12] The Benefits Review Board found Judge Tierney's decision not to specifically refer to the opinions of Drs. Jarboe and Loudon to be harmless error because both physicians found that the Claimant did not have coal workers' pneumoconiosis (D-24-33, -35, -38, -42). Dr. Jarboe reviewed medical records and opined that the Claimant's reversible and obstructive airways impairment was attributable to bronchial asthma. Dr. Jarboe found no evidence of coal workers' pneumoconiosis, and opined that the Claimant was not totally disabled based on the post-bronchodilator January 26, 1995 spirometry which showed only a minimal impairment. (D-24-33). In his consultative report of January 26, 1996, Dr. Loudon also concluded that the Claimant did not have coal workers' pneumoconiosis, and, instead, opined that the Claimant had a mild to moderate pulmonary or respiratory impairment resulting from asthma. He based his opinion on the purely obstructive nature of Claimant's impairment in addition to the clinical, radiological, and physiological evidence. Dr. Loudon opined that from a respiratory or pulmonary standpoint, the Claimant was not totally or permanently disabled. (D-24 at 35).

In his decision, Judge Tierney found that all x-rays were consistently interpreted negative by all reviewing physicians, and that no physician opined that the Claimant had pneumoconiosis.[13] (D-24-38 at 3). While Judge Tierney noted that there was evidence of a chronic obstructive pulmonary disease, he found that the physicians who diagnosed this condition related it to either asthma or smoking (D-24-38 at 3).

Judge Tierney did not make a determination regarding total disability, and, therefore, did not set out evidence related to that issue. In addition to the consultative opinions of Drs. Jarboe and Loudon, the evidentiary record before Judge Tierney included two pulmonary function studies, two arterial blood gas studies, and the opinion of Dr. Castle. While the April 29, 1994 pre-bronchodilator pulmonary function study produced qualifying values, the post-bronchodilator study was non-qualifying and showed significant improvement indicating partial reversibility of the airflow limitation. Dr. Vasudevan, who administered the test, did not opine as to whether the Claimant was totally disabled, but indicated that the study was consistent with a moderate airflow limitation with partial reversibility. (D-24-10). Dr. Castle administered a pulmonary function study on January 26, 1995 in conjunction with his examination of the Claimant. The pre-bronchodilator study was technically invalid, though Dr. Castle stated that there was clearly evidence of moderate obstructive airways disease. The post-bronchodilator values showed improvement to a significant degree, producing non-qualifying values, but still indicated the presence of a mild obstructive ventilatory defect. Arterial blood gas studies were performed by Dr. Vasudevan on April 29, 1994 and Dr. Castle on January 26, 1995, and both yielded normal results (D-24-13, -25). Dr. Castle, who also reviewed additional medical records and was deposed, opined that the Claimant had a reversible obstructive airways disease consistent with asthma and that Claimant was not permanently or totally disabled as a result of his asthma or coal workers' pneumoconiosis. (D-24-25). Accordingly, although Judge Tierney did not make a finding in regard to total disability, the record before him was devoid of objective evidence or reasoned medical opinions indicating that the Claimant was totally disabled by a respiratory or pulmonary impairment. All opining physicians agreed that Claimant's asthma was treatable and would not prevent him from returning to his usual coal mine employment.

No mistake in a determination of fact is apparent in Judge Tierney's conclusion that the evidence did not establish the existence of pneumoconiosis. The x-ray evidence before him was completely negative for pneumoconiosis and no physician opined that the Claimant had coal workers' pneumoconiosis or any other chronic dust disease of the lung arising out of his coal mine employment. The evidence overwhelming established that the Claimant's mild to moderate reversible obstructive airways disease was due to asthma. Judge Tierney's determinations were properly affirmed by the Benefits Review Board (D-24-42).

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[13] There was no biopsy evidence before Judge Tierney or this tribunal.

Change in Conditions

Existence of Pneumoconiosis

Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§ 718.304, 718.305, 718.306; or (4) the finding by a physician of pneumoconiosis as defined in § 718.201 which is based upon objective evidence and a reasoned medical opinion. The record contains no evidence of a biopsy, and the presumptions under §§ 718.304, 718.305, and 718.306 are inapposite, because there is no evidence of complicated pneumoconiosis, the claim was filed after 1981, and because the miner is living.

The existence of pneumoconiosis requires consideration of "all relevant evidence" under §718.202(a), as specified in the Act. Thus, if a record contains both relevant x-ray interpretations and biopsy reports, the Act would prohibit a determination based on x-ray alone, or without evaluation of physicians' opinions that the miner suffered from "legal" pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162, 2000 WL 524798 (4th Cir. 2000). Additionally, §718.104(d) provides that in weighing the medical evidence relevant to whether the miner suffers from pneumoconiosis, the adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.

There is no evidence of pneumoconiosis in this case. All four x-rays were interpreted as negative for coal workers' pneumoconiosis by the seven reviewing physicians, four of whom were dually qualified board-certified radiologists and B-readers. No physician opined that the Claimant had coal workers' pneumoconiosis or any other respiratory or pulmonary disease related to his coal mine employment. Dr. Forehand never diagnosed the Claimant with any form of pneumoconiosis, and, instead, consistently diagnosed and treated chronic active asthma and allergies with periods of suboptimal management (E-9). Dr. Forehand treated Claimant for a substantial period of time, treated Claimant solely for respiratory/pulmonary conditions, and based his diagnoses on physiological data, and, accordingly, his opinion as the Claimant's treating physician is entitled to substantial weight. §718.104(d). Drs. Iosif, Hippensteel, Jarboe, and Castle, who are all board-certified in internal medicine and the subspecialty of pulmonary diseases, all reviewed extensive medical evidence in this case, and all concluded that Claimant's partially reversible mild to moderate obstructive impairment was not a manifestation of coal workers' pneumoconiosis, and, instead, was related to Claimant's asthma, as diagnosed and treated by Dr. Forehand. (D-8, 9, 10; E-2, 4, 5, 7, 10, 11). Dr. Loudon's opinion, though corroborative of the other physicians' opinions in that he opined that the Claimant's obstructive reversible impairment was attributable to asthma, is accorded less weight because it was based in significant part on the premise that coal

workers' pneumoconiosis cannot be obstructive in nature, and, therefore conflicts with the Act.[14, 15] §718.201(a)(2); *See Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). The corroborative opinions of Drs. Iosif, Hippensteel, Jarboe, Castle, and to a lesser extent Dr. Loudon, are all well-reasoned, documented, and based on their reviews of extensive medical data. Accordingly, because the record is devoid of any evidence indicating that the Claimant has pneumoconiosis or that his mild to moderate partially reversible obstructive impairment is related to his former coal mine employment, this tribunal finds that the Claimant has not established the existence of pneumoconiosis. Therefore, because the Claimant has failed to establish the existence of pneumoconiosis either by x-ray or medical opinion evidence, there is no proof of a change in conditions in that regard.

Causation

In addition to establishing the existence of pneumoconiosis, a claimant must also establish that his pneumoconiosis arose out of his coal mine employment. Pursuant to §718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten years as a coal miner. In the instant case, Claimant established sixteen years and ten months of coal mine employment. Thus, had he established the existence of pneumoconiosis, he would have also been entitled to invoke the rebuttable presumption that his pneumoconiosis arose from his coal mine employment under the provisions of §718.203(b). But, because he has not established the existence of pneumoconiosis, the issue is moot.

Total Disability Due to Coal Workers' Pneumoconiosis

To prove that a claimant is totally disabled by pneumoconiosis he must establish that he has a totally disabling respiratory or pulmonary condition, §718.204(b), and show that his pneumoconiosis is a contributing cause of this total disability. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990); *Scott v. Mason Coal Co.*, 14 BLR 1-37, 1-41, 1-42 (1990). It is not enough for the miner to establish that he has a total disability which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments. Pursuant to §718.204(c), the ALJ must weigh all relevant evidence, like and unlike, with the burden on the claimant to establish total respiratory disability by a preponderance of the evidence. *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Then pursuant to §718.204(b), in the Fourth Circuit, the claimant must prove by a preponderance of the evidence that his

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[14] Dr. Loudon stated that even if Claimant was found to have coal workers' pneumoconiosis, he would not change his opinion that the Claimant's reversible and obstructive impairment was not attributable to pneumoconiosis or other occupational causes because of its "obstructive and reversible nature." (E-4).

[15] Dr. Loudon was the only physician who partially attributed Claimant's obstructive impairment to his past smoking history.

pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *See Hobbs v. Clinchfield Coal Co. [Hobbs II],* 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson.* So long as total pulmonary disability is properly established, the miner's other disabling conditions are irrelevant. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993).

Under §718.204(b)(2)(i), all ventilatory studies of record, both pre-and post-bronchodilator , must be weighed. *See Strake v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). The record contains seven valid pulmonary function studies. While the majority of Claimant's most recent pre-bronchodilator studies yielded qualifying values, all of his post-bronchodilator studies yielded non-qualifying values, which militates against total disability under applicable regulations. *See Phillips v. Jewell Ridge Coal Co.*, 825 F.2d 408, 10 B.L.R. 2-160 (4th Cir. 1987); *see also, Defore v. Alabama By-products Corp.*, 12 B.L.R. 1-27 (1988); *cf. Adkins v. Secretary, HHS*, 755 F.2d 931 (6th Cir. 1985). Accordingly, the preponderance of the pulmonary function study evidence does not establish total disability pursuant to § 718.204(b)(2)(i).

None of the three arterial blood gas studies performed between march 1999 and September 2000 yielded qualifying values, and, therefore, Claimant has not established total disability by a preponderance of the evidence pursuant to §718.204(b)(2)(ii). Since there is no evidence of cor pulmonale with right-sided congestive heart failure, Claimant has not proved total disability pursuant to Section 718.204(b)(2)(iii).

The physicians who provided opinions regarding disability opined that the Claimant's asthma caused him varying degrees of disability, but none opined that the Claimant was totally disabled by any other form of respiratory or pulmonary impairment.[16] Given the variability in Claimant's pulmonary function study results reflecting Claimant's varying degree of impairment caused by asthma, and the physicians' corroborative opinions that Claimant is only disabled by his ability to control his asthma, this tribunal finds that the preponderance of the evidence under§ 718.204(b) does not establish that the Claimant has a totally disabling respiratory or pulmonary condition. Therefore, Claimant has not proved a change in conditions in that regard.

Conclusion

The new evidence is generally consistent with evidence previously submitted by the parties and considered by Judge Tierney, and is not indicative of a mistake in a determination of fact. The evidentiary record contains no evidence of pneumoconiosis, but strongly supports Dr. Forehand's treatment of the Claimant for chronic active asthma. Claimant has failed to establish a change of conditions, and review of the evidence of record and the conclusions based upon it disclose no mistake in a determination of fact. Consequently, Claimant has established no basis that would require or allow his requested modification,

[16] Dr. Forehand was the only physician who did not provide an opinion regarding total disability.

or an award of black lung benefits.

ORDER

Claimant Tamer E. Calhoun's request for modification and claim for black lung benefits are denied.

A
EDWARD TERHUNE MILLER
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.